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April 11, 2013

Mr. Zach Rudisill, Legislative Director
Office of Congressman David Reichert
1127 Longworth House Office Building
Washington, DC 20515

Mr. Miguel Martinez, Tax & Benefits Counsel
Office of Congressman John Lewis
343 Cannon House
Washington, DC 20515

Re: Working Group on Charitable Sector

Dear Mr. Rudisill and Mr. Martinez:

The Council of Michigan Foundations (CMF) is a 40 year old state wide nonprofit membership association of more than 350 private foundations, corporate giving programs and community foundations. We work closely with our colleague regional associations of grantmakers - Philanthropy Northwest and the Southeast Council of Grantmakers - serving the Districts of Congressman Reichert and Congressman Lewis.

We are also pleased to work closely with both Chairman Dave Camp and Ranking Minority Member Sander Levin and their key staff, Adam Pradko and Alan Lee, on issues of importance to the charitable sector, including philanthropy. Thus, we are delighted to know about the important deliberations of the Working Group on the Charitable Sector and offer our resources to you and your colleagues staffing this important effort.

CMF for 35 years has worked with our Michigan Congressional Delegation and the Washington based Council on Foundations to ensure that changes to the federal tax code affirm the importance of the charitable sector by enhancing federal and state laws that encourage individuals and corporations to support charity and philanthropy through charitable contributions.

Preservation of the Charitable Tax Deduction therefore is a legislative priority for CMF and our Michigan nonprofit sector partners at the Michigan Nonprofit Association. As we have shared with Chairman Camp and Representative Levin, one in ten Michiganders works for a nonprofit and individual givers are the largest source of support for our charitable sector. At a time when the nonprofit sector is already being asked to do more, impacting the ability of individuals to give through a cap or reduction on the charitable tax deduction will impact jobs.

While we know that tax policy does not determine giving, we know from the loss of our 20 year old Charitable Tax Credits in Michigan in 2012 that tax policy impacts how much people give. The Johnson Center at Grand Valley

State University has surveyed 31 community foundations that reported a drop exceeding 50% in \$400 donations between 2012 and 2011 for donors seeking the 50% tax credit to a maximum of \$200 for a family. The Food Bank Council reports a drop of 47% in similar donations to their food banks. The result is clear - a drop in revenue of more than a million dollars and the inability to provide thousands of meals.

CMF supports fiscal responsibility at all levels of government and seeks to ensure that changes to the federal and state tax codes reduce complexity, administrative burdens and financial limitations that inhibit or limit charitable institutions in Michigan and nationwide from effectively and efficiently pursuing their charitable missions.

Therefore, as the Working Group considers issues of importance to the charitable sector, we recommend your consideration of these strategic priorities.

Priority - Support simplification of the excise tax on private foundations to a flat tax that is revenue neutral for the federal government.

Despite strong efforts in the last Congress, HR 2311 and S. 593 which would allow for a revenue neutral flat tax of 1.39% were not acted on. Your support is sought for new legislation to reintroduce this issue.

ATTACHMENT A summarizes this issue of the Excise Tax.

The 1984 Tax Act allows the excise tax on investment income to be reduced from two to one percent if a foundation's payout for the year in question equals or exceeds an amount equal to the year's assets, times the average payout percentage for the five years, plus 1 percent of the foundation's net investment income. Private foundations are the only 501(c)(3) organizations that currently pay this federal tax.

The current formula is difficult to administer and can limit charitable giving. CMF has had a long standing goal to simplify the tax to a flat one percent. However, CMF was encouraged by members of the Michigan Congressional Delegation to have an outside firm complete an analysis of what a revenue neutral number would be for a flat excise tax. Cambridge Associates completed the first analysis in September 2008 which recommended a revenue neutral number of 1.39%. In April 2010, the Joint Committee on Taxation scored the revenue neutral number at 1.39% because the Committee had access to an additional year of data from the IRS.

In 2011 CMF was asked by leaders in our Congressional Delegation to have Cambridge Associates update their earlier Analysis which was completed in February 2012 and confirms the revenue neutral number at 1.39%. This Analysis which includes the years 2006 and 2007 also demonstrates the "Katrina Effect" confirming that many foundations which paid out more due to Hurricane Katrina in 2006 reduced their charitable giving in 2007 to avoid paying the higher 2% excise tax.

This Excise Tax is costing charitable nonprofits potential grant funds greatly needed at a time when the government is cutting back with sequestration and more. More than 1, 800 of Michigan's 2,400 plus foundations are understaffed. The flat excise tax will make it easier for them to manage their charitable foundations and not have to pay their accountants to figure out the tax.

Priority - Update IRS regulations on Program Related Investments (PRIs).

Included as **ATTACHMENT B** is a July 2012 letter submitted by CMF to the Internal Revenue Service in response to the IRS request for comments on proposed new regulations for PRIs— the first in 20 years. Short of requesting a private letter ruling which can take months, the IRS has no means to assure grantmakers that a PRI is a qualifying distribution. The letter offers four recommendations – none requiring legislation – and the primary one being expedited reviews for PRIs.

- Revision to Form 8940, Request for Miscellaneous Determinations
- Amending Revenue Procedure 2012-4 (now 2013-4) to allow for an expedited determination

- Incorporating language allowing PRI rulings to be relied on by other foundations investing in the same deal
- Updating the current examples to include current investment practices and structures such as L3Cs – Low Profit Limited Liability Companies.

Despite the ability to make program related investments, research has shown that about 10% of foundations make these below market investments in projects with a charitable purpose. Opportunities for mixed use developments cannot wait for a response from the IRS to engage foundations, and as a result many of these opportunities that can result in job creation are being lost.

Priority –Support legislation that allows tax-exempt entities to invest in securities and commodities that involve indebtedness without being subject to unrelated business income tax (UBIT). This legislation would also eliminate the classification of realized gains and income, derived from leveraged real estate investments by foundations, as unrelated business taxable income.

The original intent of UBIT (Unrelated Business Income Tax) was to prevent nonprofits from competing against for-profit entities in a business that is not substantially related to its exempt purpose. However, over the last twenty years, foundations and universities have invested in hedge funds and other alternative investments to increase their investment returns and reduce the volatility of their investment portfolio. Many times these investments involve leverage (debt) that would subject the foundation to UBIT. Based on Private Letter Rulings from the IRS, foundations are able to invest in this area through offshore corporations as limited partners and avoid UBIT. The key issue is tax-exempt institutions should not be taxed on passive leveraged investments.

In addition, income derived from leveraged real estate investments, owned directly or through partnerships, is currently taxed as unrelated business taxable income (UBTI). Private foundations should be treated in the same manner as educational organizations and qualified pension plans, which since 1980 have been exempt from the debt-financed property rules with respect to the acquisition of certain real property.

Priority - Keep AmeriCorps funded through the Corporation for National and Community Service – a pipeline for young talent - 1,200 jobs - for our nonprofit grantees in Michigan alone.

Philanthropy is the giving of one's time, talent and treasure for the common good. Therefore, efforts to nurture and leverage volunteering by millions of Americans truly presents a remarkable return on investment for the Federal Government. For example:

- 1,192 Michigan AmeriCorps Members will recruit more than 20,000 volunteers this year
- 205 VISTA members will also serve 34 projects
- 10,236 seniors will serve in nearly 1,000 locations across Michigan
- AmeriCorps has allowed Michigan to have the first project in the country serving Veterans
- Federal support from the Corporation for National and Community Service leverages more than \$15 million in local support in Michigan.

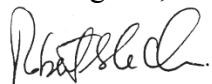
Many former AmeriCorps members are now serving as staff for nonprofit organizations, including executive directors.

Priority – Make the IRA Charitable Rollover a permanent giving tool.

We have worked closely with Chairman Camp and Representative Levin on the IRA Charitable Rollover. We thank Congress for including extension of the IRA Charitable Rollover through 2013 in the American Taxpayer Relief Act of 2012. Even in the challenging economic times of the last 8 years, the IRA Charitable Rollover continues to be a valued tool for charitable giving for Michiganders over 70.

Again, please feel free to use us as a resource for the Working Group. We appreciate your support for a vibrant and strong nonprofit charitable sector in our great country.

Best regards,

A handwritten signature in black ink, appearing to read "Robert S. Collier".

Robert S. Collier
President

Enc.

cc: Adam Pradko, Legislative Director, Office of Congressman Dave Camp
Alan Lee, Tax Counsel, Office of Congressman Sander Levin



National Legislative Goal – Simplify the Excise Tax on Private Foundations

Proposal:

Senate and House legislation is being sought to amend the Internal Revenue Code of 1986 to modify and simplify the excise tax on the investment income that private foundations pay by removing the current two tiered excise tax imposed on private foundations and replace it with one flat tax deemed to be revenue neutral. The legislation, as with S. 593 and H.R. 2311 in the last Congress, would set this flat rate at 1.39% - deemed to be revenue neutral by the Joint Committee on Taxation and would apply to tax years beginning after the date the bill is enacted.

Current Law:

Each year private foundations are required to pay an annual excise tax equal to 2 percent of their net investment income. If a foundation's distributions (measured as a percentage of assets) in a given year exceeds the average payout rate of the foundation over the preceding five years – by an amount at least as much as the 1 percent tax savings the Foundation will enjoy – then this tax is reduced to one percent. The maintenance of effort test was intended to ensure that the tax savings be used for additional charitable expenditures and not just pocketed by the foundations. By congressional directive, revenues from the excise tax are meant to fund IRS oversight of the non-profit sector.

Rationale:

CMF has long supported reduction or elimination of the current version of the excise tax because it serves as a disincentive to foundations and has never been used by the government for its intended purpose. A 2006 Study by Professors Richard Sansing of Dartmouth and Robert Yetman of the University of California noted that current law creates a tax-induced incentive to reduce contributions in difficult economic times such as we are now experiencing because a high distribution this year makes it more difficult to qualify for the lower rate during the next 5 years. Significant increased giving can occur when a foundation seeks to respond to an extraordinary event, such as Hurricane Katrina. Yet any increase in annual giving relative to the foundation's assets will necessarily increase the five year average payout.

An increase in giving relative to endowment can also occur where grantmaking remains stable, but endowment values decline. Many private foundations are seeking to maintain or increase prior grant commitments during these difficult times but end up being penalized with higher taxes when their grants return to more sustainable levels. A flat excise tax rate will simplify tax planning, especially for smaller foundations, who may lack resources for complex financial planning. The calculations of distributions necessary to qualify for the reduced tax is a moving target, because it depends on the 12 month average asset balance of the foundations, which cannot be known until the end of the year, and on the foundation's investment income, which may not be fully known until well into the following year. Foundations must base their annual budget on assumptions about the market and community needs, which can change dramatically. Foundations spend considerable time and money every year ensuring the amount spent by the end of the year is neither too high nor too low, thus allocating valuable resources to accountants and lawyers rather than grantees.

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Diana Tarpoff
R.E. Olds Foundation

Bonnie Wenick-Kutz
Community Foundation for Delta County

July 16, 2012

CC:PA:LPD:PR (REG-144267-11), room 5205
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments to Proposed REG-144267-11,
Examples of Program-Related Investments (April 19, 2012)

Sir/Madam:

On behalf of The Council of Michigan Foundations (“CMF”), I am writing to express our comments to the proposed amendments to 26 C.F.R. § 53.4944-3 concerning program-related investments. We are excited and enthusiastic that the Internal Revenue Service has taken steps to improve the guidance relating to program-related investments.

CMF is a 501(c)(3) nonprofit membership association of more than 350 grantmaking organizations working together to strengthen, promote and increase philanthropy in Michigan. CMF helps members network, learn, innovate and communicate to achieve philanthropic goals.

Program-related investments (“PRIs”) are an important, yet underutilized vehicle by which grantmakers may accomplish their charitable purposes. PRIs are underutilized for a few reasons. First, guidance with respect to the types of investments that qualify as PRIs is minimal. Even where there are examples, other taxpayers are not entitled to rely on them. Second, there is no means (short of requesting a private letter ruling) for a private foundation to obtain approval from the IRS that its investment constitutes a PRI. Since program related investments often involve for-profit businesses and unique or complicated investment structures, many grantmaking organizations are hesitant to undertake an investment without assurances from the IRS that it will constitute a qualifying distribution. Finally, given the time-sensitive nature of many of the projects through which PRIs are made, expediency in the approval process is important but not typically possible.

In connection with the proposed amendments to 26 C.F.R. § 53.4944-3, CMF proposes that the IRS, through its rulemaking authority, codify a process by which it could approve PRIs. As part of that process, the IRS could adopt procedures for expedited review of requests (similar to those already in place for expedited review of exemption applications). Finally, through the regulations, the IRS could make provision for reliance by other parties on determinations regarding PRIs.

One simple way to improve the process and guidance for making PRIs is to develop a process (short of requesting a private letter ruling) by which the IRS would approve private foundation investments. IRS Form 8940, Request for Miscellaneous Determination, could be revised to provide a mechanism for private foundations to request approval of their investments. As you know, IRS Form 8940 was recently introduced as a means for requesting a variety of determinations with respect to an organization's tax-exempt status. This form could be revised to include an option for a private foundation to request advance approval that an investment qualifies as a program related investment under Section 4944(c) and/or that expenses related to the investment constitute qualifying distributions under Section 4942. The instructions to Form 8940 could be revised to describe the specific information that should be included in the request. It appears that Rev. Proc. 2012-4, which sets forth general instructions for requesting letter rulings and determination letters, including Form 8940, would need to be modified to incorporate determination requests relating to PRIs.

Next, since PRIs often fill the role of gap financing associated with significant projects, expeditious approval of an investment as a PRI is important. Many PRIs are in projects that rely on a number of financing sources and varying stages of financing, so timeliness in securing commitments is crucial. Where economic projects rely on a number of financing sources, if the project languishes, the financing commitments will lapse. While Rev. Proc. 2012-4 allows a taxpayer who has a compelling need to request that its letter ruling or determination letter request be processed ahead of the order in which the requests are received, the revenue procedures could also be amended to provide an expedited review of PRI requests under Form 8940 where there is a compelling need. The decision whether to grant an expedited review is within IRS discretion so private foundations would still need to set forth specific facts to meet the compelling need standard. We believe a case for compelling need could be made where the closing for the financing of a PRI is scheduled four months or six months from the date the request is submitted.

The third issue CMF would like to address relates to whether other organizations interested in making investments would be entitled to rely on an IRS determination that an investment by another foundation constitutes a PRI. Currently, the Internal Revenue Code and revenue procedures indicate that a taxpayer may not rely on a letter issued to another taxpayer or use a written determination as precedent. The prohibition on reliance is especially frustrating since oftentimes with economic development projects, multiple foundations may make close to identical PRIs, or a foundation may make multiple PRIs within a particular deteriorated area on similar terms. Section 6110(k)(3) of the Internal Revenue Code provides that "unless the secretary otherwise establishes by regulation, a written determination may not be used or cited as precedent." Since the IRS is considering amendments to the program related investment regulations, we would propose that the IRS also consider incorporating language to allow rulings relating to PRIs to be relied upon by other parties.

Finally, one criticism that grantmakers have expressed with respect to PRIs is the lack of clarity regarding the form or structure in which a PRI may take. The current examples in the regulations provide guidance regarding the most basic forms of PRIs, but do not reflect current investment practices and structures. The proposed regulations, however, expand upon the basic examples. CMF also recommends including in the regulations one or more examples which discuss investments in a low-profit limited liability company ("L3C").

The L3C is a relatively new form of entity structure in Michigan and in approximately thirteen other states. It is a form of limited liability company (in Michigan, incorporated under the Michigan Limited Liability Company Act) which by definition, tracks the Internal Revenue Code's requirements for a PRI. A Michigan L3C must include in its articles of organization, and at all times conduct its activities in conformance with, a purpose that 1) significantly furthers the accomplishment of one or more charitable purposes described in section 170(c)(2)(B) of the Internal Revenue Code (and would not have been formed except to accomplish these charitable purposes); 2) does not include as a significant purpose the production of income or appreciation of property; and 3) does not include accomplishing one or more political or legislative purposes described in section 170(c)(2)(D) of the Internal Revenue Code. Although the L3C is a form of limited liability company, it is becoming more prevalent with respect to PRIs since the "L3C" designation signals to potential funders the charitable nature of a particular project.

On behalf of CMF, we are supportive of the efforts undertaken by the IRS to provide additional PRI examples that reflect more current investment practices. We are also appreciative of the opportunity to provide comments to the proposed regulations and suggestions for additional guidance that would clarify and simplify the process for private foundations making PRIs. We are hopeful that our suggestions will be considered and welcome future dialogue regarding any questions or comments that the IRS may have.

Sincerely,



Robert Collier
President and CEO
Council of Michigan Foundations

cc: Representative David Camp
Representative Sander Levin
Vicki Spruill, President, Council on Foundations